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No. 590

In the Supreme Court of the United States

OCTOBER TERM, 1958

CONSOLIDATED ELECTRIC LAMP COMPANY, ET AL.,
PETITIONERS

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT SECRETARY OF LABOR IN OPPOSITION

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OPINIONS BELOW

The memorandum opinion of the District Court for the District of Columbia (Joint Appendix (J.A.), p. 51) is not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. A) is reported at 259 F. 2d 189.

JURISDICTION

The judgment of the Court of Appeals was entered on September 18, 1958. The petition for a writ of certiorari was filed on December [illegible] 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether this Court should now review the adherence by the court below to its earlier decisions, which this Court declined to review, upholding the statutory authority of the Secretary of Labor to determine a single industrywide prevailing minimum wage under the wage determination provisions of the Public Contracts Act.

2. Whether, in the circumstances of this case, the Secretary's wage determination, made pursuant to his authority under Section 1(b) of the Public Contracts Act to determine "the prevailing minimum wages for persons employed" in a particular industry, is valid and lawful.

STATUTES INVOLVED

The pertinent provisions of the Walsh-Healey Public Contracts Act of 1936, 49 Stat. 2036, *et seq.* (41 U.S.C. 35, *et seq.*), as amended by the Fulbright Amendment of June 30, 1952, 66 Stat. 308 (41 U.S.C. 43a), are printed in the petition for a writ of certiorari (Pet. 5–6).

STATEMENT

1. *Administrative Proceedings.* On March 19, 1955, the Secretary of Labor gave notice that a public hearing would be held for the determination of prevailing minimum wages in the electric lamp industry (J.A. 230–233). A detailed statement as to the questions to be considered and the procedure to be followed at such hearing were set forth in the notice (J.A. 231). Public hearings were held, attended by management and labor representatives, between April 26, 1955 and May 27, 1955 (J.A. 9), and the record held open until

August 17, 1955, for the receipt of proposed findings, briefs, and arguments on the issues considered (J.A. 10).

On April 6, 1956, the Secretary issued his Notice of Proposed Determination in which he considered in detail all of the issues presented and all of the evidence and arguments of the interested parties (J.A. 8–25). Further opportunity was afforded to the parties to submit exceptions to the proposal (J.A. 25). After careful consideration of such exceptions (J.A. 25–29), the Secretary issued, on July 20, 1956, his minimum wage determination for the electric lamp industry, providing, principally, for a minimum wage of $1.26 an hour (J.A. 29–31).

2. *Nature of Administrative Determination.* The electric lamp industry consists of 63 plants, employing about 18,732 covered workers. Of these 63 plants, 40 are operated by 4 multi-plant companies, petitioners herein, which produce the great bulk of the lamps made in the United States. The smaller firms operate the remaining plants.

At the hearing and in argument, industry representatives contended that the Secretary lacked statutory authority to determine industry-wide rates, but, rather, was limited to action in each locality in which electric lamp plants were located (J.A. 11–12). In accordance with this contention, an extensive wage survey of 37 localities was introduced (J.A. 12; Pet. 10).

The Secretary rejected the limiting interpretation of his authority, pointing to the then recent decision of the Court of Appeals for the District of Columbia

Circuit in the *Covington* case[1] which sustained his power to make industry-wide determinations where warranted by marketing and competitive factors (J.A. 13). He then proceeded to a consideration of the uncontroverted evidence as to marketing and competitive factors, which may be summarized as follows (J.A. 13–16):

Electric lamp plants are located in various parts of the country, with the heaviest concentration being found in the Middle Atlantic Region; of the 63 establishments in the industry, 25 are located in the Middle Atlantic Region, and varying lesser numbers in six other regions throughout the country; as demonstrated by a detailed analysis of lamp shipments to Air Force and Navy installations, the marketing pattern of the industry in relation to government purchases is not restricted to the region in which a plant is located, but each of the companies ships to installations in most of the seven regions, which include 17 states and the District of Columbia, extending from New York to California and New Hampshire to Florida; some of the companies shipped to all seven regions and in no instance did a majority of the shipments from any firm go to any one region; although 40% of all plants in the industry employing 34% of the total covered employees are located in the Middle Atlantic Region, only 19% of the shipments, representing only 7% of the total value of all shipments, went to destinations within that Region; the warehouses, from which a large proportion of the government purchase

[1] See pp. 7–8, *infra*.

orders are filled, are distributed throughout the country, and each of these warehouses is supplied with lamps produced in plants located in the various different regions, so that no plant serves any specific geographic area exclusively and it is impossible when bids are invited to predict in which plant or plants any particular contract materials will be manufactured. On the basis of this and other similar undisputed evidence, the Secretary found (J.A. 15–16):

> It is thus apparent that no geographic limitations are feasible in this industry. The area of competition is industry-wide. Firms, no matter where located, generally ship their products all over the country. Multi-plant firms do not make every type of lamp in each of their plants, so that no plant may be said to serve any specific geographic area exclusively. It is impossible to predict precisely where any particular contract materials will be manufactured when bids are invited. For these reasons I find that the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under Government contracts extends to all of that area in which the industry has its plants, and that geographic differentials cannot be adopted for this industry without defeating the purposes of the Public Contracts Act.

The Secretary next gave careful consideration to wage data (J.A. 16–21)[2] and reached his proposed determination (J.A. 23–25).

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[2] The Secretary noted that the tabulation of wage data submitted by the industry panel was based on employment in various industries in 37 localities, and not in the lamp industry

The industry attack on the proposal urged that the Secretary should have relied on the wage practices in the companies (as a whole), rather than in the various plants, in the industry (J.A. 27).[3] The industry panel contended that a great majority of the lamp companies operate plants where wages substantially below the proposed minimum were paid (J.A. 27).[4] On examination of this contention, the Secretary noted that 77% of the employees in the industry were employed in 35 plants which paid no experienced worker less than $1.26 an hour (J.A. 27). Moreover, the Secretary noted that no less than the proposed minimum was paid by General Electric at 18 of its 19 plants, by Westinghouse in 5 of its 9 plants, and by Sylvania in 5 of its 8 plants (J.A. 27).[5] In the light of these facts, the Secretary found that acceptance of the "companies" test would

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alone (J.A. 19). The Secretary pointed out, in weighing this tabulation, that Section 1(b) of the Act requires that the determination of "prevailing" minimum wages must be based on wages paid in that industry rather than in some other industry (J.A. 27).

[3] As noted above, the Secretary's proposed determination was issued on April 6, 1956. On March 26, 1956, this Court had denied certiorari to review the *Covington* case. 350 U.S. 1002.

[4] The petition for certiorari makes this same suggestion (Pet. 4, Question 3; Pet. 26–27).

[5] See also the affidavit of the Assistant Administrator of the Public Contracts Division, Department of Labor, in support of the Secretary's motion to dismiss (J.A. 35–40).

The Secretary contends that all of the petitioners, except Westinghouse, lack standing to sue. See J.A. 34–35; cf. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 123, 125, 132; Danaher, J., concurring in *Mitchell* v. *Covington Mills*, 229 F. 2d 506, 511 (C.A.D.C.); opinion of District Judge Youngdahl in *Allendale Co.* v. *Mitchell*, 12 WH Cases 760 (D.D.C.).

mean that employees of all plants of a company would be treated as though employed at the lowest wage plant (J.A. 27).

3. *Proceedings Below.* Petitioners instituted this action, by complaint filed October 18, 1956, under the authority of the Fulbright Amendment, 41 U.S.C. 43(a), which authorized judicial review of minimum wage determinations in the manner provided by the Administrative Procedure Act, 5 U.S.C. 1009 (J.A. 1–7). After answer (J.A. 31–33), the Secretary filed a motion to dismiss and for summary judgment (J.A. 34–35).* The District Court granted the Secretary's motion for a summary judgment, holding that it was impossible to see "* * * how this case differs in substance and effect from the so-called *Covington* cases. * * *" (J.A. 51). On appeal, the court below, in a *per curiam* opinion, affirmed, stating that "* * * the principal issue here—the validity of the determination—is governed by the decision in *Covington Mills,* and we therefore uphold the determination, on the facts revealed by the record before us. * * *" (Pet. App. 1a).

ARGUMENT

1. The power of the Secretary of Labor to determine minimum wages on an industry-wide basis was sustained by the court below in *Mitchell* v. *Covington Mills,* 229 F. 2d 506, certiorari denied, 350 U.S.

* As indicated above, fn. 5, the Secretary's motion to dismiss was based on the contention that petitioners lacked standing to sue.

1002, rehearing denied, 351 U.S. 934.[7] In opposing the grant of certiorari in the *Covington* case, the brief in opposition on behalf of the Secretary of Labor pointed out that, while the question of statutory authority under the Public Contracts Act to make wage determinations of the type here involved was one of importance, the decision of the Court of Appeals was so clearly correct that the public interest, in view of the delay entailed by litigation, would best be served by a denial of review (Br. in Opp., No. 682, October Term, 1955, pp. 10–11). To support this position, the argument was presented in detail in order that the question might be resolved not only in the textile industry, the industry there concerned, but also in other industries where similar litigation was pending or imminent (Br. in Opp., No. 682, *supra,* p. 30). The argument covered every aspect of the problem, including every substantial argument now advanced by petitioners herein, and demonstated that the language of the statute, the long-standing administrative construction of the Act, and the understanding and purpose of Congress, required the conclusion reached by the court below (Br. in Opp., No. 682, *supra,* pp. 11–28).

We respectfully refer the Court to the brief in opposition in the *Covington* case as dispositive of the arguments advanced by the present petitioners.

2. Petitioners, however, suggest that, without regard to the identity of the arguments and problems

[7] See also *Alabama Mills* v. *Mitchell*, 244 F. 2d 21 (C.A.D.C.), certiorari denied, 355 U.S. 834; *Allendale Co.* v. *Mitchell*, 12 WH Cases 760, certiorari denied, 351 U.S. 909.

involved in this case and in *Covington*, the moment for adjudication by this Court has now arrived by reason of the lapse of time since the *Covington* decision (Pet. 18–19). We believe that the passage of time compels exactly the opposite conclusion.

Our primary position, in opposing certiorari in the *Covington* case, was that there existed a consistent and long-continued administrative construction of the Public Contracts Act as to the power of the Secretary of Labor to determine minimum wages on an industry-wide basis where the relevant factors of record warranted such a determination. We further showed that this construction of the Act accorded with congressional purpose, and was known to and had been ratified by Congress. The passage of time since *Covington* underscores the validity of the position which we took in that case. There has been no effort by Congress to question in any way the view which was expressed as to the Secretary's powers in the *Covington* case, and which was accepted by the court below in its decision there. In short, the question has at all times been one of congressional purpose and understanding, and the acceptance by Congress of the Secretary's views of his power under the statute, both before and since the *Covington* decision, renders review by this Court even less necessary now than it was at the time the petition for certiorari in *Covington* was filed.

3. The main thrust of the petition is to question the power of the Secretary recognized in *Covington*. Petitioners also argue, however, that, conceding this power in the Secretary, it must be exercised by examining

the positions of *companies* rather than *plants* (Pet. 25–27).

The contention is a curious one, which arises from the peculiar circumstances of the electric lamp industry. Clearly, if all the plants in the industry were each owned by a separate legal entity, the "companies" test would result in the same determination which was made by the Secretary in this case. In other words, petitioners are urging that, because four of them have acquired 40 of the plants in the industry, they are entitled to have the prevailing minimum wage determination reduced to the level of the minimum of their lowest-wage plant.[8]

Realistically, this contention would mean that any multi-plant company could enlist the assistance of the Secretary in reducing wages by using as a measure the lowest-wage establishment operated by that company.[9] We submit that the argument flies in the teeth of both the statutory language and the statutory purpose. First, Section 1(b) of the Act requires the Secretary to determine prevailing minimum wages "* * * for persons employed * * * *" in the particular industry. The "companies" test suggested by peti-

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[8] As shown in the affidavit of the Assistant Administrator of the Public Contracts Division, Department of Labor, *supra*, p. 6, fn. 5, there has been a tendency in the electric lamp industry to locate new plants in low wage areas of the country (J.A. 39–40).

[9] This Court has recognized that the Public Contracts Act is designed "* * * to obviate the possibility that any part of our tremendous national expenditures would go to forces tending to depress wages and purchasing power and offending fair social standards of employment." *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 128.

tioners would have little relationship to the statutory "persons employed" requirement. Second, a major purpose of the Act, as recognized by this Court, is "* * * to use the leverage of the Government's immense purchasing power to raise labor standards." *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507; *Mitchell* v. *Covington Mills, supra*; *Ruth Elkhorn Coals* v. *Mitchell*, 248 F. 2d 635 (C.A.D.C.). Again, it is obvious that the technical limitation, derived from the peculiar structure of the electric lamp industry, which petitioners seek to impose on the Secretary's power would thwart, rather than carry out, this recognized congressional purpose.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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